United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4169

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

NATIONAL AIR CARRIER ASSOCIATION, INC., et al.,

Intervenors.

No. 75-4169

ON PETITION FOR REVIEW OF ORDER OF THE
CIVIL AERONAUTICS BOARD

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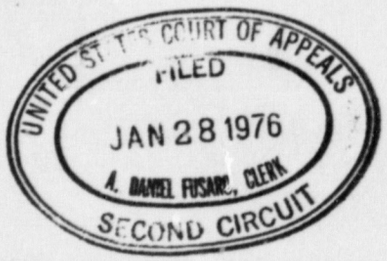
P/S

BRIEF FOR INTERVENOR
EVERGREEN INTERNATIONAL AIRLINES, INC.



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BRIEF FOP INTERVENOR
EVERGREEN INTERNATIONAL AIRLINES, INC.

THE ISSUE PRESENTED FOR REVIEW

1. Whether Regulation SPR-85, which will enable those who might otherwise be unable to fly to utilize low-cost one-stop-inclusive tour charters, is consistent both with the Civil Aeronautics Board's directive to promote "adequate, economical and efficient service by air carriers" under Section 102 of the

Federal Aviation Act of 1958, as amended, 49 U.S.C. §1302(c), and with the Board's obligation to maintain a distinction between charter and individually ticketed travel under Section 101 (36) of the Act, 49 U.S.C. §1301 (36)?

STATEMENT OF THE CASE

Intervenor Evergreen International Airlines, Inc. is a certificated supplemental air carrier under Section 401(d)(3) of the Federal Aviation Act of 1958 (the Act), 49 U.S.C. §1371 (d)(3). It is the smallest operating supplemental air carrier and, as all supplementals, is dependent upon a flexible approach to charter operations for its continued growth and stability.

On October 30, 1974, the Civil Aeronautics Board gave notice of a Proposed Rulemaking, EDR-281/SPDR-38/ODR-9, to establish a new class of charter designated as a One-Stop-Inclusive Tour Charter (OTC). Comments on the proposed regulation were filed by over one hundred domestic and foreign carriers, consumer groups, civic parties, travel agents and governmental agencies. Only a few scheduled carriers opposed the concept of the regulation.

A Supplemental Notice of Proposed Rulemaking was issued on April 10, 1975, EDR-281 B/SPDR-3B/ODR-9B. Again, a host of interested parties from the industry and its related fields filed largely favorable comments.

Based upon these comments, the Board, on August 7, 1975, issued Regulation SPR-85, which is incorporated in Part 378a of the Board's Special Regulations. SPR-85 authorizes all direct air carriers to operate OTC's which meet certain specific requirements. It became effective on September 13, 1975.

TWA seeks review of this regulation on the grounds that the regulation does not maintain a distinction between charter and individually ticketed services. Brief for Petitioner at 2. This argument was carefully considered by the Board and specifically rejected (4a).*/ Evergreen International Airlines, Inc. believes that it should also be rejected by this Court.

ARGUMENT

I. The Board has the authority and duty to amend charter regulations in light of changing economic conditions

SPR-85 is not the first modification of the Board's charter regulations. Nor is this case the first instance in which a scheduled air carrier has challenged a new charter regulation on the grounds that it was beyond the Board's statutory authority.

American Airlines, Inc., v. C.A.B., 348 F.2d 349 (D.C. in 1965) represents the first in a series of cases in which scheduled carriers, fearful of traffic diversion which has never materialized,

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*/ References are to the Board's regulation under review set forth in petitioner's Appendix at pp. 1a-101a inclusive.

have challenged the Board's charter regulations. The specific issue raised in this case was the authority of the Board to permit supplemental carriers to operate split charters. Split charters is a term of art used to describe a procedure whereby an aircraft is utilized by two or more unrelated charter groups.

The American Airlines court was required to determine whether "charter trips in air transportation" included split as well as conventional charters. Public Law 87-528, 76 Stat. 143, 49 U.S.C. §1301(33).*/ Chief Justice (then Circuit Judge) Burger noted that Congress considered but did not enact a statutory definition of charter trips. 348 F.2d at 354. He concluded that Congress intended that the Board should have authority to define the term in light of changing conditions:

> We are unable to conclude that the term charter trips has a fixed meaning or that Congress intended to restrict the Board to a definition of one aircraft-one charter. We conclude Congress intended, although not without limits, that the Board should be free to evolve a definition in relation to such variable factors as changing needs and changing aircraft. . . . We agree with the Board that the legislative history reveals that a prime concern of Congress was to maintain the integrity of the charter concept -- to preserve the distinction between group and individually ticketed travel; within these limits it is for the Board to evolve reasonable definitions. . . . 348 F.2d at 354.

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*/ Renumbered Section 101(36) by Public Law No. 93-366.

The scheduled carriers were dismayed but not dissuaded. One year later they raised the same argument with respect to a Board regulation which authorized domestic inclusive tour charters. The case was American Airlines v. C.A.B., 365 F.2d 939 (D.C. Cir. 1966). The legislative history of Public Law 87-528 was again examined and once again the court reached the same conclusion. Inclusive tour charters were consistent with Congressional intent and necessitated by changing economic conditions. 365 F.2d at 948.

The scheduled carriers were not satisfied. When the Board authorized international inclusive tour charters, the carriers came to this Court, Pan American World Airways, Inc. v. C.A.B., 380 F.2d 770 (2d Cir. 1967). This Court held that the Board had exceeded its statutory authority in authorizing the inclusive tour charters. 380 F.2d at 782. The Supreme Court affirmed its decision per curiam by an equally divided court. World Airways v. Pan American World Airways, 391 U.S. 461 (1968).

Because of the conflict between this Circuit and the District of Columbia Circuit, and the inconclusive decision of the Supreme Court, Congress enacted Public Law 90-514 authorizing the supplementals to conduct "inclusive tour charters." The Congress could have used this opportunity to define charter trips but it did not do so. In fact, the House Report states:

> We recognize that shifting economic considerations and the public convenience and necessity may require modifications in the regulations. We do not undertake here to proscribe the usual rule-making procedures of the CAB, and will leave the Board with its present flexibility. . . .
> H.R. Rep. No. 1639, 90th Cong., 2d Sess. 3 (1968).

This view was also echoed by several members of Congress on the floor of the House, including Congressman Springer who stated:

> It is best that the Board, which watches over the economic well-being of the entire industry on a continuing basis, be allowed to change rules and regulations concerning tours in light of possible changes in economic considerations not now foreseeable. 114 Cong. Rec. 2505.

Despite this clear Congressional mandate to amend charter regulations in response to changing economic conditions, the scheduled carriers continued to protest each Board modification of the charter regulations. In Saturn Airways, Inc. v. C.A.B., 483 F.2d 1284 (D.C. Cir. 1973), they disputed the legality of travel group charters (TGC). More recently, in Pan American World Airways, Inc. v. C.A.B., 517 F.2d 734 (2d Cir.), they challenged TGC's originating in foreign countries. In both instances, the regulations were upheld and the Board commended for its "painstaking . . . . evolutionary" approach to changing conditions. 483 F.2d at 1287.

It is unquestionable, therefore, that the Board has both the power and duty to amend its charter regulations in light of changing economic and public interest considerations. It is also clear that SPR-85 is fully consistent with the Board's responsibilities in this area.

II. One-Stop-Inclusive tours are charters, not scheduled services

SPR-85 contains numerous and specific restrictions on the operation of OTC's. First, OTC participants may choose only from designated flights for both departure and return. The tour operator may impose penalty provisions for cancellations. Second, all OTC participants must go and return together as a group and must travel as a group between designated points on the tour and on all ground transfers. Intermingling of groups is prohibited. Third, OTC participants must purchase the entire package, departure and return. One way passengers are prohibited. Fourth, the package must include ground accommodations and services. The participant must purchase the specific accommodations and services selected by the tour operator. Fifth, the charter must be for forty (40) seats or more. Sixth, the tour must be for at least four (4) days in North America and seven (7) days for other continents. Seventh, the participants on North American (OTC's) tours must pay in full at least fifteen (15) days in advance of the scheduled departure; others must pay thirty (30) days prior to departure. Eighth, a passenger list must be filed with the Board at least fifteen (15) days in advance of departure for North American OTC's and thirty (30) days in advance of other OTC departures. Ninth, the tour price must be not less than the price of the seat plus $15.00 for each night of the tour.

These factors clearly distinguish OTC's from scheduled services. The passenger who uses scheduled services can choose from a wide range of flights. He may leave at any time and return at any time. He can cancel or change his reservation at any time prior to departure. He can lengthen or shorten his trip on his own initiative. He can choose from all available accommodations. He has, in fact, the total freedom that most travelers require - particularly business travelers who are the heaviest users of scheduled service.

In Pan American World Airways, Inc. v. C.A.B., 517 F.2d 734, 742 (3d Cir. 1975), this Court emphasized that each of the restrictions which the Board imposed on previous charter regulations was not necessary to maintain the distinction between charter and scheduled service. Rather, this Court said what is determinative is the cumulative effect of a set of restrictions. In particular, this Court focused on three facts in evaluating the foreign originating TGC's. First, the participants are contractually bound to pay for an identified flight a certain number of days in advance. Second, all participants must go and return as a group. Third, there is a risk of a charter cancellation. 517 F.2d at 742. Each of these restrictions is included in SPR-85. Therefore, there can be no doubt that OTC's preserve the necessary distinction between charter and scheduled service.

III. The public interest will be well served by One-Stop-Inclusive tour charters

The Board proposed the OTC concept because "of the need to find effective nondiscriminatory alternatives to affinity rules and to provide a reasonable outlet for ever-increasing demand for low cost charter service." (9a). Perhaps the most persuasive evidence of the need for OTC's comes from the leading scheduled carriers. United Air Lines, the largest domestic carrier, Pan American, the largest international carrier, and Allegheny, the largest local service carrier, all support SPR-85. In their respective categories, these carriers are not only the largest in scheduled operations but also in charter operations. They realize that both they and the public will benefit from OTC's. Their dramatic change of attitude toward expanded charter service underscores the Board's assessment of the importance of OTC's (10a):

> It is, therefore, our [the Board's] judgment that reducing the historical restrictions imposed by the Board on the operation of charter service is of particular importance if the dynamic growth of air travel that until recently characterized our air transportation system is to be resumed. It is our expectation and hope that the OTC rule we have adopted herein represents an important step in that direction.

The direct air carrier industry will also benefit from the OTC concept. The heavy carrier support - both scheduled and supplemental - for these regulations is a clear

indication of their value in this respect.

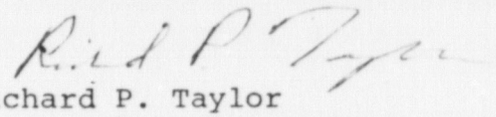
TWA stresses the advantages to the supplementals. OTC's will indeed help the supplementals increase the viability of their operations as they urgently need to do. These carriers are among the nation's principal sources of airlift in national emergencies. As then Board Chairman John H. Crooker emphasized in his testimony before the Senate in support of ITC's, supplementals must expand their civilian sources of revenue in order to maintain reserve capacity for use in such emergencies. Hearings on S.3566 before the Subcommittee on Aviation of the Senate Committee on Commerce, 90th Cong. 2d Sess. at 12 (1968).

However, TWA ignores the fact that all direct carriers can and will conduct OTC operations. The scheduled group has already moved into this area in a truly major way. This is an overall industry endeavor and is not limited to any particular class of carriers. Adoption of the TWA position would eliminate scheduled as well as supplemental carriers from the OTC field. Neither the air transportation industry nor the traveling public can benefit from such a result.

CONCLUSION

For the foregoing reasons, the Board's OTC regulations should be upheld as consistent both with the Board's need to adapt to changing economic conditions in its promotion of air transportation and with its responsibility to maintain proper distinctions between charter and scheduled service.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Richard P. Taylor, a member of the bar of this Court, do hereby certify that true copies of the Brief of Intervenor Evergreen International Airlines, Inc. were sent by United States mail, postage prepaid, this 27th day of January, 1976, to the following:

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